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No. 03-1519

In the Supreme Court of the United States

MARLON BRAMWELL, PETITIONER

v.

UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under 28 U.S.C. 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The questions presented are:

1. Whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity.

2. Whether the term "detention" requires that the property be seized knowingly and intentionally.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 348 F.3d 804. The order of the district court (Pet. App. 9-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2003. A petition for rehearing was denied on February 5, 2004 (Pet. App. 14). The petition for a writ of certiorari was filed on May 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of the United States with respect to certain tort suits, and renders it liable in damages to the same extent as a private party for injuries caused by the tortious acts of federal employees, subject to certain restrictions and limitations. Section 2680 contains a list of claims to which the FTCA does not apply. One type of excluded claim, described in subsection (c), is "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." Section 2680(c) also contains an exception to that exclusion. It provides that the FTCA does apply to

> any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

2. Petitioner is a prisoner in the custody of the United States Bureau of Prisons (BOP). According to the allegations in his complaint, BOP officers at the United States Penitentiary in Lompoc, California, took property from his cell when he was placed in administrative segregation in September 2000. Petitioner alleges that the property included an overcoat; that, unbeknownst to the BOP officers, there were eyeglasses in the coat's pocket; and that the glasses were damaged when the coat was sent to the laundry. Petitioner sued the BOP to recover the value of the glasses. Pet. 3; Pet. App. 2, 9-10.

3. The district court dismissed the complaint for lack of jurisdiction. Pet. App. 9-13. It held that "[i]nmate claims against the BOP for personal property lost or damaged as the result of the BOP's negligent acts or omissions fall within 28 U.S.C. § 2680(c)," *id.* at 12, and that petitioner's claim thus "remain[s] barred by the doctrine of sovereign immunity," *id.* at 11, which is a "jurisdictional bar" to suit, *ibid.* In granting the motion to dismiss, the district court denied, as moot, petitioner's motion to amend his complaint to substitute the United States for the BOP as defendant, finding that such an amendment "would not create subject matter jurisdiction." *Id.* at 13. The court later denied petitioner's motion for reconsideration. *Id.* at 3.

4. The court of appeals affirmed. Pet. App. 1-8.

a. The court first held that the detention-of-goods exception to the FTCA's waiver of sovereign immunity extends to "law enforcement officers other than those

engaged in tax or customs-related duties," Pet. App. 4, and that 28 U.S.C. 2680(c) thus covers actions by BOP personnel. Pet. App. 3-6. In so holding, the court noted that it had previously held that agents of the Federal Aviation Administration were "other law enforcement officer[s]" under 28 U.S.C. 2680(c). Pet. App. 4-5 (citing *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979)). The court also relied (*id.* at 5) on the definition of "law enforcement officer" under another statutory exception to FTCA liability, see 28 U.S.C. 2680(h) ("any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law"), and on the fact that "BOP officers are considered 'law enforcement officers' under several other statutes," Pet. App. 5 (citing 5 U.S.C. 5541(3), 8331(20), 8401(17)(D)(i); 18 U.S.C. 3592(c)(14)(D); 21 U.S.C. 848(e)(2); and 42 U.S.C. 3796b(6)).

b. The court of appeals also rejected petitioner's contention that, under 28 U.S.C. 2680(c), "a 'detention' occurs only when officers knowingly and intentionally take control of a person's property," and that, because the BOP officers "were not aware that [petitioner's] eyeglasses were in their possession," there was accordingly no detention here. Pet. App. 6. In rejecting that contention, the court relied on this Court's decision in *Kosak* v. *United States*, 465 U.S. 848 (1984), which held that Section 2680(c) covers "claims arising out of *negligent handling or storage* by federal officials." Pet. App. 6 (citing 465 U.S. at 854, 862). The court of appeals observed that the BOP officers "intended to detain [petitioner's] overcoat and his other personal belongings until such time as they would be returned to him," and that petitioner's eyeglasses were allegedly damaged "as a result of the negligent handling and

storage of these belongings." *Ibid.* That conduct, according to the court, amounts to the "detention" of petitioner's glasses under Section 2680(c). *Ibid.*[1]

ARGUMENT

1. Petitioner contends (Pet. 6-11) that the term "other law enforcement officer" in 28 U.S.C. 2680(c) is limited to officers acting in a tax, excise, or customs capacity. The court of appeals correctly held otherwise, and no decision interpreting the current version of Section 2680(c) has reached a contrary conclusion. Further review is therefore unwarranted.

a. Section 2680(c) deprives courts of jurisdiction to consider claims arising in respect of "the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The court of appeals correctly held that that broad language covers petitioner's claim. As far as the identity of the detaining official is concerned, Section 2680(c) applies not only to "any officer of customs or excise" but to "any other law enforcement officer"; a BOP officer fits that description. As far as the nature of the detained item is concerned, Section 2680(c) applies not only to "goods" or "merchandise" but to "other property"; a prisoner's eyeglasses fit that description. Under a straightforward interpretation of the statutory language, therefore, Section 2680(c) applies to the conduct at issue here.

b. Contrary to petitioner's contention (Pet. 6-11), the court of appeals' decision does not conflict with the

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[1] The court of appeals also held that the district court "properly denied as futile [petitioner's] request to amend his complaint to substitute the United States for the BOP as the named defendant" and that the district court "did not abuse its discretion by denying [petitioner's] motion for reconsideration." Pet. App. 7.

decision of any other court of appeals. The cases holding that Section 2680(c) is limited to detentions by an officer acting in a tax, excise, or customs capacity, *Ortloff* v. *United States*, 335 F.3d 652, 657-660 (7th Cir. 2003), cert. denied, 124 S. Ct. 1520 (2004); *Bazuaye* v. *United States*, 83 F.3d 482, 483-486 (D.C. Cir. 1996); *Kurinsky* v. *United States*, 33 F.3d 594, 596-598 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995), all interpreted the version of Section 2680(c) in effect before Congress amended it in April 2000, through the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 3(a), 114 Stat. 211. See *Ortloff*, 335 F.3d at 657 n.2 (expressly stating that court was construing pre-CAFRA version of Section 2680(c)); *Bazuaye*, 83 F.3d at 483 (discussing pre-CAFRA version of Section 2680(c)); *Kurinsky*, 33 F.3d at 596 (same). As far as we are aware, every court of appeals that has addressed the issue under the current version of Section 2680(c) has concluded, in agreement with the court below, that it extends to detentions by a law enforcement officer acting outside the tax, excise, and customs contexts. See *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Hatten* v. *White*, 275 F.3d 1208, 1210 (10th Cir. 2002); *O'Ferrell* v. *United States*, 253 F.3d 1257, 1271 (11th Cir. 2001). Indeed, two of those three courts, like the court below, have so held in a case involving BOP employees. See *Chapa*, 339 F.3d at 389; *Hatten*, 275 F.3d at 1209-1210.

Nor are the courts that have narrowly interpreted the prior version of Section 2680(c)—the District of Columbia, Sixth, and Seventh Circuits—certain to interpret the current version the same way, because the two versions differ in respects that are relevant to the issue here. As it existed before the CAFRA amendments, Section 2680(c) provided, in its entirety,

that the FTCA does not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. 2680(c) (1994). CAFRA amended the statute in two ways.

First, while the prior version provided that the FTCA does not apply to a claim arising out of the detention of "any goods or merchandise," 28 U.S.C. 2680(c) (1994), the amended version provides that the FTCA does not apply to a claim arising out of the detention of "any goods, merchandise, *or other property*," 28 U.S.C. 2680(c) (emphasis added). Because the amended version includes the phrase "other property," it would be difficult for a court to construe the term "other law enforcement officer" narrowly on the theory that the only officers who detain "goods or merchandise" are those who are acting in a tax, excise, or customs capacity.

Second, unlike the prior version, the amended statute contains an exception to its general exclusion for certain detentions made in connection with asset-forfeiture laws, which makes clear that the FTCA applies to claims arising in respect of such detentions. See 28 U.S.C. 2680(c)(1)-(4). This exception to the exclusion presupposes that the exclusion generally exempts forfeitures by law-enforcement officers from the FTCA's coverage. And since federal agents are empowered to seize and forfeit goods in a variety of circumstances, not just when they are acting in a tax, excise, or customs capacity, see *e.g.*, 18 U.S.C. 981; 21 U.S.C. 334, 881, the exception added by CAFRA reinforces the view that a broad group of law-enforcement agents are presumptively excepted from the FTCA's coverage (subject to

the exceptions to the exclusion in the CAFRA amendments).

Apart from what the CAFRA amendments themselves suggest, the legislative history of those amendments indicates that Congress wanted to provide a remedy for certain damages caused by the detention of goods by law-enforcement officers outside the tax, excise, and customs contexts. The Report of the House Judiciary Committee explained that, because the government was "exempted from liability under the Federal Tort Claims Act for damage to property while detained by law enforcement officers," H.R. Rep. No. 192, 106th Cong., 1st Sess. 18 (1999), there was no remedy under federal law for damage to a private airplane seized by agents of the Drug Enforcement Administration as part of a domestic drug-trafficking investigation, *id.* at 8-9. That concern would have been misplaced if Section 2680(c)'s exception applied only to tax, excise, and customs seizures.

Review is unwarranted, in short, because the District of Columbia, Sixth, and Seventh Circuits have not had an opportunity to address the effect of the CAFRA amendments on their decisions interpreting the prior version of Section 2680(c). Perhaps for the same reason, this Court has repeatedly denied certiorari in cases presenting the question whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity. In fact, it has done so at least four times in the last 14 months alone. See *Conrod* v. *Moore*, No. 03-8804 (June 14, 2004); *Greer* v. *United States*, No. 03-9002 (June 7, 2004); *Ames* v. *Pontesso*, 538 U.S. 1058 (2003); *Miller* v. *United States*,

538 U.S. 1036 (2003). There is no reason for a different result here.[2]

2. Petitioner also contends (Pet. 11-13) that Section 2680(c) is inapplicable to his claim because a "detention" must be knowing and intentional and the BOP officers were allegedly unaware that petitioner's eyeglasses were in his overcoat when they removed the coat from his cell. Because the court of appeals correctly held otnerwise, and because its decision does not conflict with any decision of any other court, further review of this claim is also unwarranted.

In *Kosak* v. *United States*, 465 U.S. 848 (1984), this Court held that Section 2680(c) applies not only to claims for damage to property caused by the detention itself but also to claims for damage caused by the "negligent handling or storage" of property. *Id.* at 854. Even if a "detention" must be intentional, that holding covers this case. As the court of appeals explained, the BOP officers "intended to detain" the "personal belongings" in petitioner's cell until they could be returned, and his glasses were allegedly damaged "as a result of the negligent handling and storage of these belongings." Pet. App. 6. While the officers may not have known what was in the pockets of petitioner's coat, they certainly intended to detain both the coat and anything left in its pockets (as well as the other personal property in his cell). Petitioner identifies no valid interpretive—or even policy—basis for the view that Section 2680(c) is inapplicable to any portion of the contents of a container of which the seizing agent is

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[2] The same issue is raised in another petition now pending before the Court. See *Corbeil* v. *United States*, No. 03-9719 (filed Apr. 2, 2004).

unaware, and he cites no decision of any court that has adopted that view.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner does contend that interpreting "detention" in Section 2680(c) to encompass the unknowing possession of property is inconsistent with "Congress' intent to maintain sovereign immunity where law enforcement officers * * * take control of a suspect's property due to its potential relationship to unlawful activity." Pet. 12-13. But that is not the only circumstance in which officers take control of property. Indeed, in this very case, petitioner's coat was removed from his cell, not because of any "potential relationship to unlawful activity," Pet. 13, but because he was being placed in administrative segregation, Pet. 3; Pet. App. 2, 10. In any event, even an officer who takes control of a container because of its "potential relationship to unlawful activity," Pet. 13, may not be aware of all of its contents, at least initially.